

fiction. Dr. Saw's evidence was totally disbelieved by the trial judge. His failure notwithstanding, Mrs. Mahesan was never called as a witness. No doubt it was fully realised that where Dr. Saw failed, she could not have given any useful evidence. We would repeat that the misdirection or errors, such as they were, with regard to the application of section 14, section 17 and section 15(1) of the Act have not lessened the measure of our satisfaction that no miscarriage of justice was occasioned thereby. This case is pre-eminently one for the application of the proviso to section 60(1) of the Courts of Judicature Act: see *R. v. Oster-Ritter*⁽¹⁾ applying the proviso to section 4(1) of the Criminal Appeal Act, 1907. We accordingly dismiss the appeal against conviction.

As to sentence, it is true that section 5 of the Act has no application. Section 4 therefore applies, under which the maximum penalty is 5 years' imprisonment, a fine of \$10,000 or both. The judge had weighed carefully the sentence he should pass in this case and we cannot say that he was too severe in any way. True, the housing society was technically not a public body. But the fact cannot be over-looked that the appellant was a public servant, who, by reason of his high official position, was placed in a position of trust. He has caused loss of the savings of a considerable number of civil servants, who can ill afford it. We would quash the sentence under section 5 and in lieu thereof sentence the appellant to 5 years' imprisonment and a fine of \$10,000 on the first charge and 5 years' imprisonment on the second charge, to run concurrently. In default of payment of the fine the appellant will undergo a further term of imprisonment of one year. We affirm the order for repayment of \$122,000 to the housing society: if not paid within one month hereof execution to issue.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.*

**GERALD FERNANDEZ v.
ATTORNEY-GENERAL, MALAYSIA**

[F.C. (Azmi L.P., Suffian & Ali F.J.J.) February 13, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X.97 of 1969]

Extradition — Commonwealth fugitive criminal — Application for extradition of person against whom offences under the Prevention of Corruption Ordinance, 1960 of Singapore were alleged — Whether the Ordinance applies to agent of a private company — Whether provisions of Commonwealth Fugitive Criminals (Amendment) Act, 1969 is void as it conflicts with art. 7(1) of the Federal Constitution — Whether High Court has jurisdiction to answer question — Courts of Judicature Act, 1964 — Commonwealth Fugitive Criminals Act, 1967.

In this case the appellant had been arrested on an endorsed warrant alleging offences under the Prevention of Corruption Ordinance, 1960 of Singapore against him. An application was made to the High Court by originating summons for the determination of the following questions: (1) are the offences under the Prevention of Corruption Act, 1961, restricted to persons employed by or connected with any 'public body' as defined by section 2 of that Act in relation to the affairs of such 'public body'?; (2) whether the Prevention of Corruption Act, 1961, applies to the affairs of

- A private companies, commercial concerns, etc., *inter se* and such affairs being unconnected with any 'public body' or agent or servant thereof?; (3) is a public limited company incorporated in a foreign country under the laws of such country with the Government of Malaysia as one of its major shareholders included in the definition of 'public body' in the Prevention of Corruption Act, 1961?; (4) is the Commonwealth Fugitive Criminals (Amendment) Act, 1969, retrospective in effect to allow the surrender of a fugitive criminal in respect of offences committed in Singapore before the date of its commencement, the application for surrender being made after the date of its commencement?; (4A) if the Honourable Court holds under (4) above that the Commonwealth Fugitive Criminals (Amendment) Act, 1969, to be retrospective would that Act be void for the reason that it is *ultra vires* the provisions of article 7(1) of the Constitution of Malaysia?; (5) is the Commonwealth Fugitive Criminals Act, 1967, limited only to applications for the surrender of a fugitive criminal to Singapore in respect of offences committed in Singapore after the date of its commencement?; (6) is the plaintiff a fugitive criminal within the meaning of Part III of the Commonwealth Fugitive Criminals Act, 1967?; (7) is an offence committed in the Republic of Singapore which corresponds to section 4(a) of the Prevention of Corruption Act, 1961 of Malaya an 'extradition offence' within the meaning of section 2 of the Commonwealth Fugitive Criminals Act, 1967? The Chief Justice who heard the application dismissed it. The appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) it was clear from the description of "agent" in the Singapore Ordinance that the Ordinance applied to agents of a corporation;

(2) the Commonwealth Fugitive Criminals Act is procedural and merely provides machinery whereby persons accused of having committed offences under the laws of Singapore might be arrested in Malaysia and handed over to the Singapore authorities;

(3) as at the time of the alleged offences, the Prevention of Corruption Ordinance, 1960 was already in existence in Singapore, there is no question of the Commonwealth Fugitive Criminals (Amendment) Act, 1969 making the alleged acts crimes which were not crimes when they were alleged to be committed in 1966 and 1968;

(4) as far as fugitive criminals from Singapore are concerned it is only necessary to accuse them of an offence against the laws of Singapore (provided that it is a seizable offence or an offence punishable with imprisonment for 6 months or more under the laws of Singapore) irrespective of whether or not such an offence is also an offence against the laws of Malaysia;

(5) (*per* Ali F.J.) in the circumstances of this case the originating summons was not a *bona fide* attempt to seek a legal remedy from the court but solely for the purpose of circumventing the law and the originating summons should have been dismissed on the preliminary point.

Cases referred to:-

(1) *Thomas v. Attorney-General* [1937] Ch. 72.

(2) *Dyson v. Attorney-General* [1911] 1 K.B. 410.

H FEDERAL COURT.

R. R. Sethu (James Fernandez with him) for the appellant.

Ajaib Singh (Senior Federal Counsel) for the respondent.

Azmi L.P.: I agree that the appeal on the merits should be dismissed for reasons given by my brother Suffian F.J. I wish to be associated with his remarks contained in the last paragraph of his judgment.

Suffian F.J.: We dismissed this appeal and I now give my reasons.

The appellant was arrested on 24th July, 1969, at Kuala Lumpur on an endorsed warrant issued by a

judicial authority in Singapore. The offences alleged against him are as set out in the following two charges:

"1. You, Gerald Fernandez, are charged that you, on or about the 13th day of July, 1966, at Raffles Place, Singapore, being an agent, to wit, the Secretary and Legal Adviser to the Malaysia-Singapore Airlines, did corruptly accept for yourself a gratification, to wit, \$6,000 from one Quek Chong Choy, an agent of M/s. Edward Lumley & Sons (S) Pte. Ltd., which payment was sanctioned by a Director of the firm, namely Ronald Halkerstone MacDougall, as a reward for showing favour to M/s Edward Lumley & Sons (S) Pte. Ltd. in relation to your principal's affairs and you have thereby committed an offence punishable under section 6(a) of the Prevention of Corruption Ordinance, 1960 and punishable under section 6 of the said Ordinance.

2. You, Gerald Fernandez, are charged that you, on or about the 5th day of August, 1968, at Raffles Place, Singapore, being an agent, to wit, the Secretary and Legal Adviser to the Malaysia-Singapore Airlines, did corruptly accept for yourself a gratification, to wit, \$5,000 from one Quek Chong Choy, an agent of M/s. Edward Lumley & Sons (S) Pte. Ltd., which payment was sanctioned by a Director of the firm, namely Ronald Halkerstone MacDougall, as a reward for showing favour to M/s Edward Lumley & Sons (S) Pte. Ltd., in relation to your principal's affairs and you have thereby committed an offence under section 6(a) of the Prevention of Corruption Ordinance, 1960 and punishable under section 6 of the same Ordinance."

Pending an inquiry under section 11 of the Commonwealth Fugitive Criminals Act, 1967, he was remanded on bail. Hearing was fixed for 15th, 16th and 17th September.

On 21st August the appellant by his solicitors, Chin & Fernandez (of which firm he was a member), filed an originating summons under R.S.C. Order 54A, rule 1A, seeking determination of five questions and for declarations accordingly. At the hearing before the learned Chief Justice on 15th September three further questions were added.

In brief, the plaintiff asked for rulings which would have the effect of freeing him from the liability of being surrendered to the Singapore authorities. The learned Chief Justice gave rulings adverse to him and also held that the application by way of originating summons was misconceived.

The plaintiff (again by his solicitors) appeals.

The eight questions on which rulings were sought were as follows:

- "(1) Are the offences under the Prevention of Corruption Act, 1961, restricted to persons employed by or connected with any 'public body' as defined by section 2 of that Act in relation to the affairs of such 'public body'?"
- (2) Whether the Prevention of Corruption Act, 1961, applies to the affairs of private companies, commercial concerns, etc., *inter se* and such affairs being unconnected with any 'public body' or agent or servant thereof?"
- (3) Is a public limited company incorporated in a foreign country under the laws of such country with the Government of Malaysia as one of its major shareholders included in the definition of 'public body' in the Prevention of Corruption Act, 1961?"
- (4) Is the Commonwealth Fugitive Criminals (Amendment) Act, 1969, retrospective in effect to allow the surrender of a fugitive criminal in respect of offences committed in Singapore before the date of its commencement but the application for surrender being made after the date of its commencement?"
- (4A) If the Honourable Court holds under (4) above that the Commonwealth Fugitive Criminals (Amendment) Act,

- A 1969, to be retrospective would that Act be void for the reason that it is *ultra vires* the provisions of article 7(1) of the Constitution of Malaysia?"
- (5) Is the Commonwealth Fugitive Criminals Act, 1967, limited only to applications for the surrender of a fugitive criminal to Singapore in respect of offences committed in Singapore after the date of its commencement?"
- (6) Is the plaintiff a fugitive criminal within the meaning of Part III of the Commonwealth Fugitive Criminals Act, 1967?"
- B (7) Is an offence committed in the Republic of Singapore which corresponds to section 4(a) of the Prevention of Corruption Act, 1961 of Malaya an 'extradition offence' within the meaning of section 2 of the Commonwealth Fugitive Criminals Act, 1967?"

Questions (1) to (3) relate to the same point. The argument before the learned Chief Justice which was repeated before us was as follows. The plaintiff was employed in Singapore at the time of the alleged offences as the Secretary and Legal Adviser to a commercial airline, the Malaysia-Singapore Airlines (M.S.A.). It was argued that the Prevention of Corruption Act, 1961, did not apply to the private sector, and that no one but an employee of a "public body" came within the purview of the Act. The learned Chief Justice rejected this submission on the ground that it was alleged in the charges against the appellant that he was an "agent" at the time he took the two bribes from Mr. Quek, and that an agent was defined in section 2 as follows:

E "agent" means any person employed by or acting for another, and includes a trustee, administrator and executor, and a person serving under any public body, ... (my underlining).

I agree with the learned Chief Justice's conclusion but for a slightly different reason. It is to be noted that the offences alleged against the appellant took place in Singapore, that his trial will eventually be held there and that the law under which he is charged is not the Malaysian Prevention of Corruption Act, 1961, but the Singapore Prevention of Corruption Ordinance, 1960. Therefore any ruling on the meaning of the Malaysian Act is irrelevant. Also, the Singapore Ordinance defines "agent" as meaning "any person employed by or acting for another, and includes a trustee, administrator and executor, and a person serving under the Crown or the Government or under any corporation or public body, ...". M.S.A. is certainly a corporation.

As regards questions (4) and (5), the learned Chief Justice held that the appellant could be surrendered to the Singapore authorities under the Commonwealth Fugitive Criminals (Amendments) Act, 1969, even though the offences of which he is accused were committed before the enactment of that Act, because Parliament has clearly so provided by section 20 which reads:

I "Every fugitive criminal shall... be liable to be arrested and returned, whether the offence in respect of which the return is sought was committed before or after the commencement of this Act, ..."

Section 1 (2) of the Commonwealth Fugitive Criminals Act, 1967, as originally enacted, provided as follows:

"This Act or any part thereof shall... apply to such Commonwealth countries to which by reason of any binding arrange-

ment entered into with any such country for the extradition of fugitive criminals on the terms and conditions substantially similar to those contained in this Act it may seem expedient to the Minister to apply the same by Order to be published in the *Gazette*."

Singapore is a Commonwealth country and at first sight the above provision appears to require an extradition treaty with Singapore to authorize Singapore offenders found here to be arrested and returned to Singapore. But it is quite plain from Part III of the Act which is entitled "Return of Fugitive Criminals to the Republic of Singapore" that special provisions were thought by the legislature to be necessary with regard to Singapore which is joined to the southern tip of West Malaysia by a short causeway, and therefore as regards Singapore no extradition treaty should be necessary. To remove any doubt section 1 (2) was amended by Act A7 of 1969 with effect from 27th February, 1969, by the addition of the following proviso:

"Provided that this sub-section shall not apply in the case of the Republic of Singapore; and this Act or any part thereof shall apply to that country notwithstanding that no binding arrangement referred to has been entered with that country."

I agree with the learned Chief Justice that the Commonwealth Fugitive Criminals Act is procedural. The offences which the appellant was alleged to have committed were created by the Singapore Prevention of Corruption Ordinance No. 39 of 1960, which came into operation on 17th June, 1960. The Commonwealth Fugitive Criminals Act, 1967, did not create these offences; it merely provides for the machinery whereby persons accused of having committed such offences in Singapore might be arrested in Malaysia and handed over to the Singapore authorities.

As regards question (4A), the learned Chief Justice said that he was not competent to answer it because of article 4 (4) of the Constitution. The material parts of article 4 of the Constitution read as follows:

"(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

(2) ...

(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or —

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in clause (3) (not being proceedings falling within paragraph (a) or (b) of the clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the clause."

With respect, I think the learned Chief Justice was in error in thinking he had no jurisdiction. This is not a proceeding for a declaration that the Commonwealth Fugitive Criminals (Amendment) Act, 1969, is invalid on the ground mentioned in clause (3) (namely,

A because Parliament was not competent to enact it), but on the ground that it was inconsistent with article 7 (1) which reads:

"No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed."

B It was competent of the High Court to give a ruling on this question.

Probably the learned Chief Justice was misled by being referred to an unamended copy of section 48 (1) of the Courts of Judicature Act No. 7 of 1964 which originally read —

C "Where in any proceedings in any High Court a question arises as to the effect of any provision of the Constitution the judge hearing such proceedings shall stay the same on such terms as may be just to await the decision of such question by the Federal Court."

D Note well the mandatory word underlined. The appellant's solicitors in their written submission to us repeated the above text, but the word "shall" has been amended by Act No. 35 of 1964 to read "may". So it is quite plain that the High Court has jurisdiction. But even without the amendment the High Court would be competent to give a ruling on this question, for the original text of section 48 (1) of the Courts of Judicature Act was clearly inconsistent with the Constitution, the general scheme of which is to empower the High Court (subject to certain restrictions) to pronounce on the constitutionality of Federal and State laws.

E Coming now to the substantive question whether or not the Commonwealth Fugitive Criminals (Amendment) Act, 1969, is void because it conflicts with article 7 (1) of the Constitution, I am of the opinion that it does not. As I have said, the Act did not create the offences with which the appellant was charged; it merely provided the procedure for arresting him here and surrendering him to Singapore. At the time of the alleged two offences there already existed in Singapore the Prevention of Corruption Ordinance, 1960, and there is no question of the Commonwealth Fugitive Criminals (Amendment) Act, 1969, making the alleged acts crimes which were not crimes when they were committed in 1966 and in 1968.

F As regards questions (6) and (7), it was argued that the allegations against the appellant, if they constituted an offence in Singapore, did not constitute an offence in Malaysia and therefore the appellant was not a fugitive criminal within the meaning of the Commonwealth Fugitive Criminals Act, 1967, and he could not be surrendered to the Singapore authorities.

G It is true that section 10 under which the appellant was arrested refers to a fugitive criminal; that a fugitive criminal is defined by section 2 as meaning "an individual who is accused ... of an extradition offence committed within the jurisdiction of a prescribed Commonwealth country and is, or is suspected to be, in some part of Malaysia"; that an extradition offence is defined by the same section as meaning "in relation to a prescribed Commonwealth country, an offence which is specified in, or which may be specified by order under Schedule I"; and that Schedule I which deals with

extradition offences in relation to prescribed Commonwealth countries opens with the words "The following list of extradition offences is to be construed according to the appropriate law in force in Malaysia on the date of the alleged offence".

I agree, however, with the learned Chief Justice that the definitions in section 2 do not apply. That section provides that the definitions apply "unless the context otherwise requires". Fugitive criminals from Singapore, as distinguished from other Commonwealth countries, are specially dealt with in Part III. Section 10(1) under which the appellant was arrested expressly provides as follows:

"Where —

- (a) a warrant has been issued by a judicial authority in Singapore for the arrest of a fugitive criminal accused or convicted of an offence against the laws of Singapore, being a seizable offence or an offence punishable on conviction with imprisonment for six months or more under the laws of Singapore;.. "

The words underlined make it quite clear that as far as fugitive criminals from Singapore are concerned, it is only necessary to accuse them of an offence against the laws of Singapore (provided that it is a seizable offence or an offence punishable on conviction with imprisonment for six months or more under the laws of Singapore), irrespective of whether or not such an offence is also an offence against the laws of Malaysia.

A fugitive criminal from a Commonwealth country other than Singapore arrested here is brought before a Malaysian magistrate under section 8. According to paragraph (a) of subsection (2) of that section, the offender may prove that the act alleged against him does not constitute an offence under the law of Malaysia. A fugitive criminal from Singapore arrested here is brought before a Malaysian magistrate under section 11. Subsection (2) of that section has nothing corresponding to paragraph (e) of subsection (2) of section 8 and so it is quite futile for the fugitive criminal from Singapore to prove to the magistrate that the alleged act does not constitute an offence under the law of Malaysia.

In view of my judgment on the merits of this matter, I do not propose to say anything about the procedural objection of the respondent.

During the arguments we had occasion to remark on the conduct of the appellant. He was and is an advocate and solicitor and therefore an officer of the court. Because of this, when he appeared before the learned magistrate he was allowed personal bail in the sum of \$5,000. He was released the same day and told to appear for the enquiry under section 11 on 15th September. Because of this originating summons which came up before the learned Chief Justice at 9 a.m. on the 15th, the proceedings before the learned magistrate were deferred until 2.30 p.m. The learned Chief Justice dismissed the appellant's application, but throughout the proceedings not a word was said about the appellant having absconded though this fact must have been known at least to some of his legal advisers, and it was not until 2.30 p.m. that day when the matter came up again before the learned magistrate was it revealed that the appellant had absconded. In

A fact he had absconded on 2nd August, and to this day the authorities do not know where he is lurking. This is disgraceful conduct on the part of the appellant and totally unworthy of an officer of the court; some of his legal advisers are also guilty of disgraceful conduct. I endorse the learned Chief Justice's strictures.

B Ali F.J.: We dismissed this appeal indicating that we would give our reasons later.

Gerald Fernandez, the above-named appellant, was and, perhaps, is still wanted by the Singapore authorities to stand trial for criminal offences alleged to have been committed by him there. A warrant of arrest issued by the judicial authority in Singapore was executed in Kuala Lumpur on the 24th July, 1969. On the date of his arrest, Gerald Fernandez was practising in Kuala Lumpur as an advocate and solicitor. He was duly produced before the local magistrate who released him on bail pending an inquiry fixed to be held on the 15th, 16th and 17th September, 1969. Nothing turns on the legality or otherwise of his arrest either here or in the court below. On the 21st August, 1969, an originating summons was filed in the High Court by a Mr. Jeffrey Fernandez of M/s Chin and Fernandez, a firm of advocates and solicitors in Kuala Lumpur, purporting to act for and on behalf of the appellant. The originating summons was made under Order 54A rule 1A of the Rules of the Supreme Court. It was in the nature of an application for the determination of certain questions of construction under certain provisions of the Malaysian Prevention of Corruption Act 1961, and the Commonwealth Fugitive Criminals Act 1967, as amended in 1969. Five questions were listed in the summons but at the hearing further questions were added by leave of the court. Although rule 1 of Order 54A speaks of "declarations of rights of the parties interested" in the determination of the questions, the application did not state the nature of the rights to be declared by the court. It merely says "declarations accordingly". It is perhaps pertinent to refer to the circumstances in which this originating summons came to be heard by the learned Chief Justice on the morning of 15th September, 1969, that is, a few hours before the inquiry was to be held in the magistrate court. These facts were referred to by the learned Chief Justice in his judgment and I have no reason to doubt that they are true. In a frantic attempt to have the originating summons heard before the date of the inquiry, the appellant's solicitors filed a notice of motion on September 9th for an interim injunction to stay further proceedings in the inquiry. Nothing, however, came out of this as arrangements were made for the originating summons to be heard by the learned Chief Justice before the inquiry which was fixed for the afternoon of the same day.

I When the application was first heard in chambers the respondent raised a preliminary objection contending to the effect that the remedy sought by the appellant could not be obtained under Order 54A rule 1A. It was pointed out that on the face of the originating summons there was nothing to show that the appellant was claiming any legal or equitable right within the meaning of rule 1A. It was further submitted that the appellant was due to appear before a magistrate in an

inquiry which was a criminal inquiry and that if the application was entertained by the court there would be no end to it. There could be no doubt that the purpose of the appellant's application was to seek the High Court to declare that he is not liable to be surrendered to the Singapore authorities to stand his trial there. As I see it the respondent's preliminary objection was nothing more than that this was not a proper case in which the court ought to make a declaratory judgment. Counsel for the respondent has referred to the case of *Thomas v. Attorney-General*⁽¹⁾ in which a similar objection was raised by the Attorney-General. Farwell J. in that case said at page 78:

"If the court is bound in this case to entertain this application it might be that there would be many other applications of a similar kind raising all sorts of questions in connection with Acts of Parliament. That, of course, is not in itself any reason for saying that this application should not be entertained, but it shows what may be the importance of this case, and I think the court ought to consider the question very carefully, not merely because a heavy burden might be thrown upon the Attorney-General, but because it is a matter of real importance whether in a case of this kind it ought not to be left to the Attorney-General to take such steps as he thinks fit to move the court to restrain anything which he considers an improper use of the powers given to the trustees rather than to permit the trustees themselves to bring proceedings and obtain a decision upon a point which is not a practical one at the moment."

Similarly, in this case the appellant has not yet been surrendered to the authorities in Singapore. The important question whether he should or should not be surrendered is a matter to be inquired into by the magistrate. This is expressly required by section 11 of the Commonwealth Fugitive Criminals Act 1967. As far as the High Court was concerned there was no immediate questions of practical importance to be decided on the originating summons. In any case, however, it was submitted by the respondent that the court has a discretion under rule 4 of Order 54A and that this discretion should not be exercised in favour of the appellant. Against this objection the appellant's counsel has submitted that he was seeking a negative declaration and quoted *Zamir on Declaratory Judgment* that it was possible for the court to make such a declaration. It was not stated, however, what kind of negative declaration was required. In any case it was argued that Order 54A should not be given too narrow a construction as to debar the appellant's application. The appellant also took the point that irregularity in procedure, if any, has been waived by the respondent who has entered unconditional appearance. At that point the learned Chief Justice, taking the view that this was an application for a declaration, decided to hear it on the merits before ruling on the objection. The matter was accordingly adjourned to open court for arguments on the merits.

In his judgment the learned Chief Justice dealt with all questions before him and considered the various contentions raised by the appellant. Suffice it for me to say that the answers given by the learned Chief Justice are all against the appellant. In dismissing the application the learned Chief Justice has said:

"... The application by way of originating summons was thus clearly misconceived and not to be countenanced..."

Whether in so saying his Lordship had in mind that the preliminary objection by the respondent was well

A founded because the originating summons was not the proper form of proceedings or whether the application has no merits whatsoever is not clearly stated in his judgment. But from the records it seems clear that the judgment was written after the order dismissing the application was made. By then the learned Chief Justice came into possession of facts not disclosed at the hearing. The following words of the judgment indicate this:

B "... The reason for this unusual departure from established practice was revealed within hours of my dismissal of the application. When the inquiry before the magistrate was opened at 2.30 p.m. the same afternoon the court was informed that the plaintiff had left the jurisdiction as early as August 2..."

C It was in the light of these subsequent facts that the learned Chief Justice has found it necessary to remark on the frantic endeavours to obtain a declaratory judgment.

For the purpose of this appeal I am only concerned with the question whether on the materials before him the learned Chief Justice was right in dismissing the application. I have no doubt that he was. More than one reason can be given for dismissing this appeal and there is none to support it. On the question of procedure it is all very well to say that the appellant is not to be shut out merely because he has adopted the wrong procedure. The courts here and in England have always been inclined to entertain applications for declarations even though such applications are not in proper form. In proper cases the court would make declaratory orders but not otherwise. As was stated in *Dyson v. Attorney-General*⁽²⁾ at page 423:

F "But the court is not bound to make declaratory orders and would refuse to do so unless in proper cases, and would punish with costs persons who might bring unnecessary actions: there is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy and easy access to the courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials,..."

G Perhaps in this case the learned Chief Justice has found there was a real cause of complaint and for this reason has proceeded to hear the application on its merits. I can find no real cause of complaint. Order 54A rule 1A speaks of legal and equitable right. By this I understand it to mean real right and not imaginary right. It is not unnatural that the appellant should want to avoid standing trial in Singapore. He has the right to resist any unlawful attempt to surrender him to the Singapore authorities but he should exercise that right in the proper manner. The Commonwealth Fugitive Criminals Act 1967 gives him this right. The questions raised in the originating summons are designed to support the contentions not only that he is not liable to be prosecuted for the offences alleged against him but also that he is not liable to be surrendered to the Singapore authorities. There is nothing to prevent the appellant from raising these contentions at the inquiry before the magistrate. But then Mr. Jeffrey Fernandez, the appellant's solicitor, in paragraphs 25 and 26 of his affidavit said that the determinations of all the questions are of practical utility to the appellant and ought to be made in the interests of justice; that the appellant's

case could be disposed off easily and without difficulty once the High Court has decided on the questions; and in any event these questions cannot be disposed off satisfactorily or at all at the inquiry before the magistrate. He did not say why the questions cannot be disposed off satisfactorily at the inquiry. The reason, in my judgment, was clearly to circumvent the law. It is common knowledge that in this country magistrates or presidents of the subordinate courts would respectfully defer to any judicial pronouncement by the High Court. To ask the High Court to decide on the various legal contentions was to put the magistrate or the president in the difficult situation of having to decide for himself on these legal contentions. A much stronger reason or motive was to delay the inquiry proceedings before the magistrate. The first sign of an attempt to delay the proceedings was the filing of the notice of motion. The appellant failed in the attempt. He now complains that he is not satisfied with the answers given by the learned Chief Justice. It may well be that further attempts will be made by taking this matter further. All in all there is every reason to think that the originating summons filed in the High Court was not a *bona fide* attempt to seek a legal remedy from the court. The failure to state the nature of the rights to be declared is clear indication that proceedings were commenced in the High Court solely for the purpose of circumventing the law. That was the main reason for the preliminary objection raised by the respondent. I am satisfied that it is a valid reason and on that score alone the originating summons should have been dismissed. The reasons given by the learned Chief Justice for dismissing the application may perhaps be different from mine. On that ground I do not propose to express any opinion on the answers given to the various questions raised by the appellant. Perhaps the learned Chief Justice should not have answered the questions at all having indicated in his judgment that he was deciding on the preliminary objection. The fact remains that the questions have been answered and to that extent it is possible to argue that the application was dismissed on the merits. Either way it makes little or no difference for I am of the considered opinion that it is an application which should not be entertained by the court.

Appeal dismissed.

Solicitors: *Chin & Fernandez.*

**NG ENG KOOI & ANOR. v.
PUBLIC PROSECUTOR**

[F.C. (Azmi L.P., Suffian & Gill F.J.J.) March 2, 1970]

[Kuala Lumpur — Federal Court Criminal Appeal
No. X.3 of 1967]

Customs and Excise — Quantum of proof on accused under Customs Ordinance, 1952, ss. 115 & 131(2).

Evidence — Customs and excise — Onus of proof on accused persons — Customs Ordinance, 1952, ss. 115 & 131(2).

The two appellants were charged with being knowingly concerned in conveying prohibited goods to wit 50 bags of

rice which could not be imported except under licence, with intent to evade the prohibition applicable to such goods, an offence contrary to section 13(1)(c) of the Customs Ordinance, 1952. As regards the question of whether the rice was prohibited goods, the prosecution had to prove that it had been brought at some time from outside Malaysia and that there was no licence for its import, and to do so they were entitled to invoke the assistance of section 115 of the Ordinance. The effect of section 115 was that there was cast on the accused the burden of proving either that the rice had not been brought from outside Malaysia or that its import was under licence. The prosecution had to prove also that each of the accused knew that the rice was prohibited goods, in the sense that it had been imported without a licence. As to this, there was a presumption in favour of the prosecution under section 131(2) of the Ordinance. On the evidence adduced and with the aid of the provisions of sections 115 and 131(2) of the Ordinance, the prosecution had made out against the accused a case which if unrebutted would warrant their conviction. The learned president therefore called upon them to enter their defence. The defence was a simple one, namely that the rice had not been brought from outside Malaysia. The learned president found that the accused had not discharged the burden of proof under section 115, nor had they been able to satisfy the court to rebut the presumption under section 131(2). He found them guilty, convicted and fined each of them \$5,000 or nine months imprisonment in default, and forfeited the lorry and the rice. He was upheld by Yong J., who subsequently on the application of the accused, under section 66 of the Courts of Judicature Act, reserved the following question of law for the decision of the Federal Court:

"Whether the quantum of proof on an accused person to discharge the onus placed on him by section 115 and/or section 131(2) of the Customs Ordinance, 1952, should be —

- (a) to the satisfaction of the court, or
- (b) on the balance of probabilities, or
- (c) to raise a reasonable doubt."

Held: (1) where an enactment expressly provides that a particular fact shall be presumed or deemed to exist "unless the contrary is proved" it is unnecessary for the defendant to prove whatever he has to prove beyond reasonable doubt, for all that he has to do is to satisfy the court on a balance of probabilities that it is more likely than not that the fact which he seeks to prove or disprove exists or does not exist, as the case may be. In other words, the burden which lies on him is the same as that which lies on a successful party in civil proceedings;

(2) the distinction between "satisfaction on a balance of probabilities" and "satisfaction beyond reasonable doubt" is well established in the law, since the courts always stress, when the onus of proof is on the accused (for example, where he raises the defence of insanity, or where some statute puts the onus on him) that he need satisfy the jury only on the balance of probabilities, which is lesser than the onus on the prosecution, namely satisfaction beyond reasonable doubt. Taking the words "satisfaction of the court" to mean "satisfaction on the balance of probabilities" it would seem clear that question (a) in this reference can be equated with question (b);

(3) the mere expression "to the satisfaction of the court" is unsatisfactory when referring to the degree of proof required of a defendant in prosecutions under the Customs Ordinance;

(4) in order to rebut the presumption under section 131(2) of the Customs Ordinance the accused in the present case had to prove on the balance of probabilities that the 50 bags of rice did not come within the category of "dutyable" or "uncustomed" or "prohibited" goods;

(5) under section 115 of the Customs Ordinance the fact that the rice in question had not been lawfully imported is presumed unless the contrary is proved, although the section does not say so in so many words;

(6) the quantum of proof required of a defendant is the same whether it is a question of introducing evidence to rebut a presumption or introducing evidence to prove that which is required to be proved. The quantum of proof in either